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# In the Supreme Court of the United States

OCTOBER TERM, 1952

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No. 541

JAMES P. McGRANERY, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

*v.*

PAUL WM. VORT, ERNEST NAUEN, AND PAUL WM. VORT AND JULIAN H. BASCH, AS TRUSTEES U/W OF FRED BASCH, DECEASED

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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The Solicitor General, on behalf of James P. McGranery, Attorney General, as successor to the Alien Property Custodian, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on October 13, 1952.

**OPINIONS BELOW**

The opinion of the District Court filed on April 11, 1951 (R. 75-86) * is reported in 99 F. Supp. 57.

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* References to the three-volume blue covered Joint Appendix will be designated "R."; those to the Transcript of Record (brown cover), containing the complete Markham testimony, as "T. R.".

The supplemental opinion filed on May 1, 1951 (R. 86-87) is reported at 108 F. Supp. 263. The *per curiam* opinion of the Court of Appeals (R. 1302) is reported at 199 F. 2d 782.

## JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1952 (R. 1304). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

In 1939, Fred Basch and respondents Vort and Nauen conspired with other Americans and with a German partnership to "cloak" or conceal the ownership by the Germans of 375 shares of stock in an American corporation. In 1943 and 1947, respondents Vort and Nauen purported to purchase for value and for their own account some of the "cloaked" shares from other parties to the conspiracy. There was no showing that the purported sellers had authority to make the sale, and no license for the transaction was obtained under the "freezing" regulations. Before any purchases were made in 1943, all the parties to the conspiracy filed affidavits and had representations made on their behalf to the Treasury Department and to the Office of Alien Property Custodian that they were bona fide owners of the stock and that there was no German ownership or interest in it. They were then orally assured by the then Deputy Alien Property Custodian that he did not object to the 1943 sale, and that if it was later

determined that the shares were German-owned, he would vest the proceeds of the sale and not the shares. The 1947 sales were consummated without knowledge of them by the Government. The Attorney General, as successor to the Alien Property Custodian, subsequently vested under the Trading with the Enemy Act all the stock that had been "cloaked" in 1939, including the shares which were sold in 1943 and 1947. The present suit is under Section 9(a) of the Trading with the Enemy Act for return of the vested shares. The courts below, although finding a conspiracy to "cloak", as stated above, have held that the shares sold in 1943 and 1947 must be returned.

The questions presented are:

1. Whether the Attorney General is bound with respect to the shares purchased in 1943 and 1947 by the oral assurance given by the former Deputy Custodian in 1943, so that respondents Vort and Nauen may, by reason of that assurance, recover the shares.

2. Whether, assuming that the Attorney General could ever be bound by such an assurance, the present assurance should be disregarded because induced by fraudulent misrepresentations.

3. Whether, the Attorney General having recovered from the respondents by counterclaims the dividends which respondents received on the shares they themselves took as "cloaks" in 1939, the respondents may set off against his recovery the amount by which the receipt of such dividends in-

creased their income tax payments, when those payments were a necessary incident of the "cloaking" scheme in which respondents were engaged.

### STATUTES INVOLVED

The relevant provisions of the Trading with the Enemy Act, as amended, and of the Executive Orders are set forth in the Appendix, *infra*, pp. 28-35.

### STATEMENT

On December 22, 1948, the Attorney General vested, under the Trading with the Enemy Act, 1442 shares of Herman Basch & Co., Inc., a New Jersey corporation, as the property of Thorer & Co., a German partnership and an enemy national. Of those 1442 shares, 518 stood in the name of respondent Vort, 136 stood in the name of respondent Nauen, and 156 stood in the name of the respondents Vort and Julian Basch, as trustees of the estate of one Fred Basch, who had died in 1943 (R. 5-8). On September 21, 1949, the Attorney General vested the dividends paid on the vested shares from January 1, 1939, to December 31, 1948 (R. 27-29).

The respondents brought suit under Section 9(a) of the Trading with the Enemy Act to recover the shares vested from them. The district court found[1] that at a February 1939 conference at Trenton, New Jersey, the respondents Vort and Nauen, and Fred Basch, agreed with others and

[1] The court's findings are embodied in its opinion (R. 75-86). For purposes of this petition, we accept all of those findings; we here present only questions of law.

with representatives of Thorer & Co., a German partnership, to conceal or "cloak" (R. 81) the continued ownership by the German partnership of 375 shares of the 500 shares of Althor, Inc., a New York corporation, which then held title to the 2000 outstanding shares of Herman Basch & Co., Inc., a New Jersey corporation (R. 79-82).[2] As a part of the basic conspiracy, Thorer & Co. took a repurchase option on the 375 shares, and the Americans to whom those shares were transferred, including the respondents Vort and Nauen and also Fred Basch, executed cross-options among themselves, so that no sales could be made outside of the group. (R. 80) The district court found "that in fact the money purported to have been paid to the Germans was really their money," (R. 80-81), that the plaintiffs were "cognizant to a large extent of the plan to cloak" and willing "to join in the conspiracy and assist in protecting the German interest" (R. 81), and that "[I]t is clear that the whole Trenton transaction was a sham and that the Germans still retained the control of the [Althor] company" (R. 82).

In December of 1940, the option to Thorer & Co. was purportedly cancelled, upon a payment of $63,000 by the Althor stockholders to Thorer & Co. Concerning this cancellation, the district court found that "a dividend of $64,000 was declared [by Althor] to make this payment," and "I am

[2] As part of the same agreement, the Germans sold outright to Vort 50 shares of Althor, 50 to Fred Basch, and 25 to Nauen (R. 80).

satisfied that the cancellation of the options was fictitious and that the Germans still remained in control" (R. 83). Finally, in August of 1941, the cross-options among the stockholders were cancelled, the cancellation being "pre-dated to January 1941" (R. 83, 84). This cancellation, the court found, "was gone through evidently to prevent the seizure of the [Althor] stock by the United States" (R. 83), and the pre-dating of the cancellation "was a continuation of the fraudulent concealment of the German interests, when the stockholders were compelled to file affidavits that they were the true owners of the [Althor] stock standing in their names" (R. 84).[3]

In 1941, after Executive Order No. 8389—the "freezing" order—had been amended to cover German assets, each of the Althor stockholders, including the respondents Vort and Nauen and Fred Basch, filed reports on Form TFR-300 with the Treasury Department stating that they held all their Althor shares free and clear, with no interest or claim in any foreign national. See *e.g.*, TFR-300 filed by respondent Nauen (R. 1203-1207). In 1942 and 1943, they similarly caused representations to be made to the Treasury Department and to the Alien Property Custodian that they owned their Althor shares free and clear and that there was no other interest therein. For example, respondent

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[3] The court noted that certain "freezing controls" went into effect in the Spring of 1940 and that the "conspirators were evidently concerned about the extension" of them to German property (R. 82).

Nauen filed an affidavit on June 29, 1942, in which he stated (R. 1199):

> I have no understanding or agreement with anyone, directly or indirectly in connection with said stock, and no one but myself has any interest in said shares. The entire interest in said shares, both actual and beneficial, is in myself.

Mr. Myron Cowen,[4] who was employed as attorney to represent the Althor company and its shareholders, specifically directed the Alien Property Custodian's attention to these representations in a letter dated January 30, 1943 (R. 1011-1012):

> Each shareholder has heretofore presented affidavits to the Treasury Department, certifying that they own their shares in their own right, and that no one else has any interest of any kind, either directly or indirectly in such shares. Even though we know such to be the fact, it has been thought that, because of the former business association of some of the stockholders with the former German owners, a sale of a substantial part of their shares would be looked upon with favor. While none of the stockholders are desirous of disposing of their shares, they are willing to place the interests of the company above their own personal interests, if by so doing the company is permitted to operate free of any governmental

[4] There is no contention by the Government that Mr. Cowen was cognizant of the conspiracy; or that either he or Mr. Markham acted otherwise than in good faith.

supervision or restriction not common to all American corporations.

On the facts found by the district court, these representations were false.

Several of the persons who had taken some of the 375 Althor shares in 1939 had been attorneys for the German Thorer & Co. and one was a cousin of one of the leading partners in Thorer & Co. (R. 84). Because of those facts, the Treasury and the Custodian were investigating the ownership of the Althor shares in 1942 and 1943. The suggestion was then made [5] that the attorneys and Theodore Koch should sell some of their shares to the respondents Vort and Nauen and to Curt Mahler (T. R. 6-7).[6] The stated reasons for this proposed sale are indicated in the letter of Mr. Cowen, quoted above.

Mr. Cowen discussed this proposal with Mr. James E. Markham, the Deputy Alien Property Custodian. The sole evidence, other than hearsay,

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[5] The record does not indicate who made the suggestion for a sale. Although respondents urged below that the sale was made upon the suggestion of the Custodian, the district court did not so find, but found merely that Mr. Markham "did not object" to it. (R. 84). Mr. Markham's testimony was that during discussions with Mr. Cowen "a suggestion was made" for a sale; that he advised Mr. Cowen "that he ought to write a letter to the office telling what he proposed to do" (T. R. 7); and that he told him that he "had no objection" to a sale. (T. R. 8).

[6] The attorneys and Koch made up part of what was termed the "investment group" of Althor stockholders (R. 84).

Mahler was also a member of the "investment group" (R. 108, 109, 275). There are pending in the District Court for the Southern District of New York, suits brought by him and his wife under Section 9(a) of the Act to recover shares vested from them.

as to Mr. Markham's attitude toward the 1943 sale is his own testimony in this suit (T. R. 2-65). He stated to Mr. Cowen that he did not object to the proposed sale; that, since the Althor shares had not been vested, the holders could sell and the purchasers would get a good title; and that, if the Alien Property Custodian later decided that the shares in question were German-owned, he would vest the proceeds of the sales and not the shares (T. R. 8-9). However, he testified that this assurance was made "on the information that I had at the time" (T. R. 42), which, of course, included the numerous false affidavits filed. He refused to give a letter stating that he would not vest, saying "it was not my practice to tell what I would do in the future" (T. R. 10). As to a license under "freezing" controls for the transaction, he said, "We gave them no license. They could act on their own." (T. R. 19.)

Mr. Markham made no written memorandum or other record of the assurance which he had given. He testified that he gave no information of it to his successors as Custodian [7]—Mr. Donald C. Cook, and Mr. (now Circuit Judge) David L. Bazelon. (T. R. 38, 43, 44.) [8] Apparently, the first time he

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[7] Mr. Markham became Custodian in 1944, succeeding Mr. Leo T. Crowley.

[8] Mr. Markham disclaimed any intention to bind a successor. He testified (T. R. 16):

> Q. Well, did you tell him [Mr. Cowen] that the Office would never vest the shares?
>
> A. I spoke for myself only.
>
> Q. Well, I don't think that is responsive.
>
> A. I told him while I was Alien Property Custodian that I was not going to vest the shares. That if they wanted to sell, sell them, and tell the whole story, and

told anyone about the commitment was when he told Mr. Berger, respondents' counsel, "when he [Berger] had this case" (T. R. 15).

Upon receiving this assurance from Mr. Markham, respondent Vort bought shares of Althor from George Ward and William Lancaster, who were other parties to the 1939 agreement (R. 84). Vort purchased these shares with his own money and intended to hold the shares as his own property, with the intent that he, together with respondent Nauen and Fred Basch, should control the Althor corporation (R. 85).

In 1944, Althor, Inc., was dissolved, and the 2000 shares of Herman Basch & Co., Inc., held by Althor were distributed among its stockholders, including the respondents Vort and Nauen, and the estate of Fred Basch, at the rate of 4 shares of Basch for each share of Althor (R. 24, 30, 33, 36, 38, 40).

In 1947, respondent Vort bought 118 shares of Basch from other parties to the 1939 agreement and respondent Nauen bought 40.[9] There was no evidence of any additional assurance given to respondents in 1947 or of any knowledge by the Government of the 1947 sales. Indeed by letter of November 28, 1945 (R. 1178), the respondents had been put on notice that the Government was still investigating the matter. Again, the respondents paid with their own money. (R. 85.)

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write a letter in here and tell us what they were going to do.

Q. Did you intend to bind the Office so that no succeeding Custodian could vest?

A. I only intended what the words import.

[9] Fred Basch died in January, 1943, and made no purchases subsequent to the agreement of February, 1939.

The district court held that the Attorney General was entitled to retain the vested shares that the respondents Vort and Nauen, and Fred Basch, had acquired by transfers from the Germans in 1939, but that the respondents Vort and Nauen were entitled to recover the shares they bought in 1943 and 1947 from other parties to the 1939 agreement (R. 85). It also held that the Attorney General was entitled to recover from the respondents on his counterclaims the amounts of the dividends received by Vort, Nauen, Fred Basch, and his estate,[10] from 1939 to 1948, on the 408 shares the Attorney General was held entitled to retain, but that the respondents could set off against those counterclaims the amounts by which the income taxes paid by them had been increased by reason of those dividends (R. 86-87, 93). The result was to allow a recovery to respondents Vort and Nauen of 402 shares, to allow the Attorney General to retain 408 shares, and to allow a $57,600 set-off to all of the respondents on the Attorney's General's counterclaims (R. 90-92).

Both sides appealed. The court of appeals, in a *per curiam* opinion, held that the findings and conclusions of the district court were in all respects correct, and affirmed. It held that the respondents Vort and Nauen acquired by "bona fide purchase" the shares they bought in 1943 and 1947 (R. 1302).

REASONS FOR GRANTING THE WRIT

1. The courts below have given almost conclusive effect, as limiting the power of the United States

[10] Fred Basch's estate is represented herein by its trustees, *viz.*, respondents Vort and Julian Basch.

to seize and retain enemy property, to an oral assurance, given by the Deputy Alien Property Custodian and never recorded in writing or communicated to the successor Custodians, that he would not vest these shares.[11] They have done so, moreover, despite the fact that the Deputy Custodian's action was induced by false representations made by or on behalf of the respondents as part of what the courts below have found to be a "conspiracy" (R. 81) for the "fraudulent concealment of the German interests" (R. 84).

The effect which was given to this oral assurance appears from the district court's opinion, which embodied its findings and conclusions. Those findings and conclusions were expressly approved by the court of appeals. (R. 1302). Although the district court's opinion is not wholly explicit, it seems clear on its face that it held binding on the Government what the then Deputy Alien Property Custodian, Mr. Markham, told the respondents' attorney, Mr. Cowen, in 1943, and that it was because of Mr. Markham's statements that the courts below held the respondents entitled to stand as bona fide purchasers.

The district court said with respect to the 1943 sale (R. 84-85):

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[11] We believe that a fair reading of Mr. Markham's testimony, taken as a whole, is that he was not doing anything more than stating informally how the matter of Herman Basch & Co. stood in his mind at the time. The informality with which he treated the matter certainly supports this impression. But even if he intended to make a binding commitment, such a commitment could not, for reasons which we shall develop at length, have the effect which we believe the courts below have given it.

. . . a suggestion was made that what was called the "management group", consisting of the plaintiff Vort and his associates, should buy certain of the stock held by Ward and Koch and their associates, who were members of the "investment group", so as to oust them from the controlling interest. The Alien Property Custodian did not object to this sale and so advised Mr. Cowen, who was representing the stockholders. He also told Mr. Cowen that since the stock was not vested, the parties had a right to make this sale, and that the purchasers would get a good title to the property; also, that if at any later time the Alien Property Custodian determined that this particular stock was German owned, he would vest the proceeds of the sale, rather than the stock. The plaintiffs claim that as they acted upon the suggestion and with the approval of the Alien Property Custodian, the Government is estopped from vesting the stock itself. However that may be, the transaction was an open one with full knowledge of it by the Alien Property Custodian [12] and the money used in the purchase apparently was the money of the purchasers. As the stock was to be sold there

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[12] We read, "with full knowledge of it by the Alien Property Custodian" to mean no more than that in 1943, before making the purchases, the stockholders advised the Custodian of the proposed sales (See, R. 1011-1075, 1152-1154). The stockholders never disclosed to the Custodian that the shares in question were "cloaked" for the German Thorer & Co.; to the contrary, their attorney, Mr. Cowen, "was representing that there was no German ownership in the company" (T. R. 6), and they had filed numerous affidavits making like representations (see *infra*, pp. 21-22).

> was no reason why the plaintiffs should not be the purchasers. They were seeking to get the control of the company and it does not seem that they were doing that in the interest of the Germans.

Thus the district court's opinion, although formally disclaiming any holding that the United States was estopped by Mr. Markham's statements, in effect gave almost controlling force to those statements. The scant space devoted to the 1947 sales (R. 85) is indicative that the court's conclusion as to them was deemed to flow from its conclusion as to the 1943 sales. Moreover, analysis of both transactions demonstrates that the result reached can be explained only on the ground that in some way what Mr. Markham told Mr. Cowen made the sales "bona fide" and bound the Government, for it is clear that, absent the statements made by Mr. Markham, the sales would have been invalid both as a matter of private law and under the Trading with the Enemy Act. We shall illustrate these propositions by reference to the 1943 sales, pointing out, however, that essentially the same considerations are applicable to the 1947 sales.

a. In 1943, respondent Vort bought from George Ward shares which he knew Ward held as a "cloak" for the Germans under an agreement to which Vort, as well as respondent Nauen and Fred Basch, was himself a party (R. 81-84). That is, Vort knew that Ward held only the record title and that Thorer & Co. was the beneficial owner.

*Stoehr* v. *Wallace,* 255 U.S. 239, 251; *Kind* v. *Clark,* 161 F. 2d 36, 46-47 (C.A. 2), certiorari denied, 332 U.S. 808. In the absence of some element of estoppel, Ward could not transfer to Vort more than he held, the bare record title. Insofar as Ward held as an agent for the Germans, he was an agent to conceal and not to sell, and authority to transfer the real ownership would not be implied. *Restatement of the Law of Agency* (1933) §§ 34, 35, 52. And, since Vort and Nauen knew when they purchased that the beneficial ownership was in Thorer & Co., that ownership would not be cut off. *Utah* v. *United States,* 284 U.S. 534, 543-544; *Scott on Trusts* (1939), § 288. As against the Germans, to whose rights the Attorney General succeeded by the vesting order, the fact that the respondents bought with intent to make the property their own, would add nothing; nor would the fact that they paid their own money make an otherwise fraudulent and inequitable transaction bona fide and valid.[13] *Milwaukee & Minnesota R. Co.* v. *Soutter* 13 Wall. 517, 546; *Lowenstein* v. *Reikes,* 60 F. 2d 933 (C.A. 2); *Commonwealth Finance Corporation* v. *McHarg,* 282 Fed. 560, 569 (C.A. 2); *Baldwin* v. *Short,* 125 N.Y. 553, 560, 26 N.E. 928. In all these circumstances there is nothing to stamp the transaction as what the Court of Ap-

[13] In no sense were the purchases "bona fide". The purchasers intended to prevent the United States from vesting property they knew to be enemy owned. Moreover, any effort by them to acquire beneficial ownership of the shares would have been a breach of faith with their German co-conspirators, for whose benefit they had agreed with the sellers to "cloak" the shares.

peals termed a "bona fide purchase". See, *Pomeroy's Equity Jurisprudence* (5th ed., 1941), § 762.

b. Under the Trading with the Enemy Act—leaving aside the assurance given by Mr. Markham—the purchases would have been equally invalid. Buying property from an enemy is "trade" with the enemy (Trading with the Enemy Act, Sec. 2(d), *infra*, p. 28) and such "trade" is unlawful. Section 3(a), *infra*, p. 28.[14] Even if Vort had believed that Ward was selling "on account of" Thorer & Co., the transaction would have been prohibited. On such a purchase, Vort could base no "right or remedy". Sec. 7(b) (*infra*, pp. 30-32). The same result follows under Executive Order No. 8389, as amended (*infra*, pp. 34-35. That order prohibits except as licensed, all "transfers" and "dealings in" evidences of ownership, such as stock certificates (see, *United States* v. *Leiner*, 143 F. 2d 298, 300 (C.A. 2)), of foreign property subject to the order. An unlicensed transfer is void. *Propper* v. *Clark*, 337 U.S. 472, 484. Indeed, even apart from statute or regulation, a sale of enemy property during wartime is ineffective against the sovereign. *Schrijver* v. *Sutherland*, 19 F. 2d 688 (C.A.D.C.).

Vort knew when he purchased from Ward that he was buying German property; therefore, unless he obtained a license, he knew that he was engaged

[14] Section 3 of the Act has been held to be still vital, except as to transactions authorized under Section 5(b) and the freezing regulations. *United States* v. *Leiner*, 143 F. 2d 298 (C.A. 2).

in a prohibited transaction.[15] No license was applied for, and no one regarded what Mr. Markham said as a license. To have applied for a license would have been to admit what the respondents were then denying, that the property was German; thus, as James Stevenson, one of the other participants in the conspiracy, testified, the question of a license did not arise (R. 268). Mr. Markham testified without contradiction, referring to Executive Order No. 8389, that he gave no license (T. R. 19) [16] and neither opinion below suggests that a license was given. For this reason also, the purchasers of the German-owned shares got nothing.[17]

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[15] We take the statement of the district court that "the shares were not blocked" in 1947 (R. 85) to be a conclusion of law based, presumably, on the fact that no specific order had been issued with respect to the shares, while such an order had been issued with respect to the accounts of the corporation in 1942 and later revoked (R. 1044-1045). But if the shares were in fact German-owned, Executive Order No. 8389 applied by its terms without the necessity of a specific order. Moreover, the removal of a specific blocking order on the corporate accounts, in order to permit the corporation to continue to operate, obviously did not have the effect of unblocking the shares so as to permit ownership of the corporation to change hands without a license.

[16] We do not question Mr. Markham's authority as Deputy Alien Property Custodian to give an oral license, had he intended to do so, which he clearly did not. A license by inadvertence would seem to raise questions of estoppel, as to which see *infra*, pp. 18-23.

[17] The interest claimed here, as in *Propper* v. *Clark*, 337 U.S. 472, is one of title adverse to the Custodian and obtained after freezing and without a license. In *Propper*, this Court held that such a claim could not stand as against the federal program. Such a title transfer does not present the considerations to which this Court alluded in *Zittman* v. *McGrath*, 341 U.S. 446, 452-459. Compare *Orvis* v. *McGranery*, No. 404, this Term.

c. Thus, apart from Mr. Markham's statements, the sales were ineffective to transfer title to these respondents. The district court's opinion, however, apparently regards these defects in respondents' title as having been swept aside by Mr. Markham's oral assurance not to vest. We do not believe that Mr. Markham intended to make a binding commitment; we think he was merely stating his present intentions. (See p. 12, n. 11 *supra*.) But in any event, in holding that what Mr. Markham said in 1943 bound the Government in this suit, we believe that the decisions below were erroneous, for the reason that Mr. Markham had no authority to bind the then Alien Property Custodian or a successor to refrain from exercising the authority to vest.

The authority to seize, or vest, enemy property is an attribute of the United States in its capacity as sovereign. *Central Trust Co.* v. *Garvan*, 254 U.S. 554, 566. The delegation of that authority to the Custodian is found in Executive Order No. 9193, as amended (*infra*, p. 35), which provides:

> The Alien Property Custodian is authorized and empowered *to take such action as he deems necessary in the national interest, including, . . . the power to . . . vest.* [Section 2; italics added.]

A power to act "in the national interest" is not to be surrendered or waived without express authority. Nothing in the Trading with the Enemy Act even hints that the Custodian or his subordinate

may waive or bargain away this power. If a successor Custodian deemed it necessary in the national interest to vest the Basch shares, it was his duty to do so.[18] In holding, in effect, that the statements of Mr. Markham were binding on the Government in this proceeding, the decisions below run counter to a long line of decisions of this Court that the United States is not to be prejudiced in its property interests by the unauthorized acts or declarations of its agents. *Federal Crop Ins. Corporation* v. *Merrill*, 332 U. S. 380, 384; *United States* v. *California*, 332 U. S. 19, 39-40; *Wickard* v. *Filburn*, 317 U. S. 111, 118; *United States* v. *Stewart*, 31 U. S. 60, 70; *Wilber Nat. Bank* v. *United States*, 294 U. S. 120; *Hart* v. *United States*, 95 U. S. 316, 318; *Whiteside* v. *United States*, 93 U. S. 247; *The Floyd Acceptances*, 7 Wall. 666, 676; *Lee* v. *Munroe and Thornton*, 7 Cr. 366, 368-369.

d. The foregoing rule is applied even where the facts were fully disclosed. *A fortiori*, the United States is not bound where the action of its agent is affected by misrepresentation or mistake of fact. It is well settled that the United States is not bound by the action of the President or of the Custodian in returning seized enemy property when the action results from mistake or fraud. *Cummings* v. *Societe Suisse pour Valeurs de Metaux*, 85 F. 2d 287, 289 (C.A.D.C.); *Societe Suisse pour Valeurs de Metaux* v. *Cummings*, 99 F. 2d 387 (C.A.D.C.), certiorari denied, 306 U. S. 631; *Rodiek* v. *United*

[18] Indeed, Mr. Markham disclaimed any intention to bind his successor, see n. 8, *supra*.

*States,* 117 F. 2d 588, 120 F. 2d 760 (C.A. 2), affirmed, 315 U. S. 783; *Isenberg* v. *Biddle,* 125 F. 2d 741, 743 (C.A. D.C.); *Swiss Nat. Ins. Co.* v. *Crowley,* 136 F. 2d 265 (C.A.D.C.), certiorari denied, 320 U. S. 763. A like rule would seem clearly applicable here. It is clear from the findings and from undisputed facts that Mr. Markham's statements were influenced by concealment and affirmative misrepresentation both as to the real ownership of the shares held by the sellers, Ward, Lancaster, and Koch, and as to the character and status of the purchasers, in 1943, respondent Vort and Curt Mahler. Respondents and the other Althor stockholders had two aims: to conceal the German ownership of the Althor shares to be sold by Ward, Lancaster, and Koch; and to convice the Government that the purchasers were not themselves acting for the Germans and therefore were what Mr. Markham called "appropriate purchasers" (T. R. 37-38).[19]

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[19] In 1943 Ward, Lancaster, and Koch were under some suspicion, while the "management", Vort and Nauen (Fred Basch died in January, 1943) were under no suspicion at all. Ward and Lancaster (and, probably, his associate Stevenson), were under some suspicion because they had acted as attorneys for Thorer & Co. and because they had received "fees" sufficient to finance the purchases of shares they claimed to have made in February, 1939 (T. R. 4-8, 21-22, 35-36). Koch had also received "fees" and was a relative of Paul Hollender, one of the heads of Thorer & Co. (R. 77, 79). They were also under investigation because Ward and Koch at least were connected with the companion Thorer company of Thorer & Hollender, Inc. (T. R. 4, 64). On the other hand, according to Mr. Markham, no question arose at that time as to the "management", Vort and Nauen (T. R. 36, 64), and he understood that the proposed sales meant that the people involved in Thorer & Hollender were getting out and Vort was staying in (T. R. 64). If Vort had in fact no connection with

What the district court found was that in 1939, *all* the stockholders, including the respondents as well as Ward, Lancaster, and Koch, acquired the Althor shares under the one agreement to "cloak" for the Germans. The sole difference was that Vort, for example, was "cloaking" the title to only 39 of his 89 shares, while Ward was "cloaking" all of his 95. It further found that in entering into this sale and the subsequent option cancellations of 1940 and 1941 respondents joined in the cloaking "conspiracy" (R. 81) and participated in "fraudulent concealment of the German interests." (R. 84.)

From these findings, it follows inescapably that the affidavits and statements filed by the respondents and their confederates with the Treasury and the Alien Property Custodian in 1941 and 1943 were false and intended to conceal the continuing German interests. All the stockholders acted in concert in making those affidavits and representations, they consulted about what to say, they reviewed the drafts of each other's affidavits, and they exchanged copies (R. 1138-1139, 1140-1141, 1143, 1147, 1157, 1191, 1192, 1193, 1273-1274, 1274). The affidavits represented to the Government that the Trenton transaction had been an outright and bona fide sale, and that all the stockholders held their Althor shares in their own right, with no one

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any "cloaking' scheme, then he could have been a bona fide purchaser, and Mr. Markham's statement that the purchasers would get a good title (T. R. 9) would have been correct, apart from the question of a Treasury license with which Mr. Markham did not concern himself.

else having any interest of any kind, direct or indirect. (R. 1011). The attorney-stockholders, Ward, Lancaster, and Klein, were particularly explicit to that effect (R. 1041, 1049, 1144, 1189, 1292). Respondent Nauen's affidavit makes the same point (R. 1199). That respondent Vort knew of those representations is not open to question. He testified that he asked the attorney-stockholders to give him copies of the affidavits (R. 169), and the affidavits of Ward and Lancaster were specifically mentioned (R. 169, 171).

It is also clear that Mr. Markham was influenced by these misrepresentations.[20] Mr. Markham, who was called as a witness by the respondents and who was not in this respect contradicted, testified that in 1943, "I decided to the best of my belief on the information I had at the time" (T. R. 42). That information necessarily included the affidavits, as is confirmed by the report of the Custodian's investigators approved in June 1943 (R. 1176-1178).[21] Mr. Markham testified that he read the affidavits or was told about them by his subordinates (T.R. 21). Moreover, Mr. Cowen specifically called Mr. Markham's attention to these affidavits by let-

[20] Respondents, having made false representations to the Government, have no standing to insist that reliance on those statements and on nothing else at all must be established exactly. Having set out to deceive the Government and obtained the result they desired, they should not now be heard to urge that in a proceeding some eight years later the Government failed to show that their fraud was the only proximate cause. *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238, 246.

[21] It was not until the investigation by Bliss and Orr of Koch's files in St. Paul in 1945 that more evidence was secured (T. R. 48-49, 66-67).

ter (*supra*, p. 7) and, presumably on the basis of those affidavits and statements made to him by his client, "was representing that there was no German ownership in the company." (R. 6) Mr. Markham regarded Mr. Cowen as a man whom he had reason to trust, for Mr. Cowan was a friend of, and had been introduced to him by, one of his own friends (T. R. 10, 54, 58-61).

On these facts, we believe that the decisions below permit respondents to profit by their own misrepresentations and are therefore erroneous. Equity requires that its suitors shall have acted fairly and without fraud or deceit as to the controversy in issue. *Precision Inst. Mfg. Co.* v. *Automotive M. M. Co.*, 324 U.S. 806, 814-815. See also, *Keystone Driller Co.* v. *General Excavator Co.*, 290 U.S. 240, 245; *Kitchen* v. *Rayburn*, 19 Wall. 254, 263; *Standard Oil Co.* v. *Clark*, 163 F. 2d 917, 934-935 (C.A. 2), certiorari denied, 333 U.S. 873. These considerations, at a minimum, require that a suitor in equity be not allowed to take advantage of official action induced by his own misrepresentations. See cases cited pp. 19, 20, *supra*, and *cf. Standard Oil Co.* v. *Clark*, *supra*.

2. Related considerations apply to the income tax credit which the courts below allowed to the respondents. According to the decisions below, the Custodian rightly vested 408 shares of Basch stock as German-owned.[22] From 1939 to the vesting of the shares in 1948 the respondents received in

[22] Those were the product of the 102 shares of Althor stock which respondents Vort and Nauen, with Fred Basch, took in February, 1939, as "cloaks" for the Germans.

dividends on those shares some $93,000 (R. 90-92). In 1949, the Attorney General vested the right to those dividends (R. 27-29).

As fraudulent grantees, respondents were bound to account for the income they received from the property. *Rudin* v. *Steinbugler,* 103 F. 2d 323 (C.A. 2); *Commonwealth Finance Corporation* v. *McHarg,* 282 Fed. 560 (C.A. 2). The courts below so held in allowing petitioner's counterclaims.

As against this recovery by the petitioner on his counterclaims, however, the courts below allowed to respondents, as a credit, the amount by which the receipt of the dividends on the 408 "cloaked" shares increased their income tax payments (R. 86-87).[23] In that we believe that they erred. To a successful "cloaking" of the German ownership of those shares it was absolutely necessary that the respondents should treat the shares in every way as their own. To report the taxes on those shares as income to Thorer & Co. was unthinkable; to fail to pay the taxes was to invite investigation. The taxes had to be paid and were paid as part of a scheme to circumvent the law and to conceal enemy property, and as an expense of an unlawful scheme they may not be recovered from the United States. *Pan American Co.* v. *United States,* 273 U.S. 456,

[23] It seems clear that the dividends were "income" to the respondents within the statutes. 26 U.S.C. 22(a). *Commissioner* v. *Wilcox,* 327 U.S. 404; *Rutkin* v. *United States,* 343 U.S. 130. Respondents received the dividends under a "claim of right" and were taxable thereon, even though they might be held liable later to others for what they received. *North American Oil Consolidated* v. *Burnet,* 286 U.S. 417; *United States* v. *Lewis,* 340 U.S. 590.

509; *Mammoth Oil Co.* v. *United States,* 275 U.S. 13, 55; *Standard Oil Co.* v. *Clark,* 163 F. 2d 917, 928, 934-935 (C.A. 2), certiorari denied, 333 U.S. 873. Thus in the *Standard Oil* case the Court of Appeals disallowed a claim of a plaintiff for money paid to acquire record title to certain shares, on the ground that ". . . the money advanced was just a step in misrepresenting the ownership of the stock". (*Ibid.*) The same rule is applied in the ordinary case of a fraudulent conveyance:

> Almost invariably some honest consideration is made the agency for floating a scheme of fraud against creditors, and if that may always be saved, nothing is lost by the effort and the temptation to venture it is increased. [*Baldwin* v. *Short,* 125 N.Y. 553, 560; 26 N.E. 928.] [24]

[24] By a similar line of reasoning, the Government might be held entitled to retain both the shares of stock purchased by respondents and the proceeds of the sale received by the vendors. Mr. Markham recognized that both could be vested (T. R. 22), and that was the course actually followed. The proceeds were vested by Vesting Order No. 13853, dated September 21, 1949, 14 F.R. 5855, and by settlements the vendors have relinquished any interest they might claim to such monies. The vesting, of course, concludes nothing (*Central Trust Company* v. *Garvan,* 254 U.S. 554, 567), and, as we have indicated, a bona fide purchaser for value without notice of the "cloaking" would be entitled to recover the shares, but a purchaser who knew what he was buying might be held to have taken the chance of losing both the stock and the money used as an expense of an illegal scheme. Cf. Section 16 of the Trading with the Enemy Act, which provides that "any property, funds . . . concerned" in a willful violation of the Act shall be forfeited to the United States. In an analogous situation where the Government has sued to annul land patents procured by fraud, the ordinary rule that a vendor seeking to annul a sale fraudulently induced must offer and be ready

3. The questions are important. In giving to the unrecorded oral statement of Mr. Markham the practical effect of an estoppel, the courts below departed from the settled principle, which is of vital importance in the conduct of all aspects of government, that sovereign powers may not be waived or surrendered by agents of the United States except with express statutory authority. Moreover, even assuming power in Mr. Markham to make a binding commitment, the result below does violence to another fundamental principle of government—that official action induced by fraudulent misrepresentation does not bind the government. Finally, in allowing the respondent to set off expenses—the increased tax payments—incident to the effectuation of their fraudulent scheme, the courts below appear to have departed from settled principles of equity. The principles involved in this case are of general application to all governmental activities; their vindication is of especial importance in a case involving a conspiracy with our enemies to defeat the exercise of the war powers.

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to return the consideration received has been held not to apply to suits by the United States, since the purpose of such a suit is to "enforce a public statute against those who have violated its provisions." *United States* v. *Trinidad Coal Co.*, 137 U.S. 160, 170. And see *Causey* v. *United States*, 240 U.S. 399, 402. However, this question was not presented in the district court in this case because no proceeds were collected by the Government until after trial herein. In any event, the fact that the proceeds were vested does not entitle respondents to recover the shares; at most it might require that upon remand some order be entered with respect to the proceeds.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

WALTER J. CUMMINGS, JR.,
*Solicitor General.*

JANUARY, 1953.

APPENDIX

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. 1 *et seq.:*

Sec. 2 * * * The words "to trade," as used herein, shall be deemed to mean—

* * * * *

(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

(d) Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign, or otherwise dispose of, or receive any form of property.

(e) To have any form of business or commercial communication or intercourse with.

Sec. 3. That it shall be unlawful—

(a) For any person in the United States, except with a license of the President, granted to such person, or to the enemy, or ally of enemy, as provided in this Act, to trade, or attempt to trade, either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy, or is conducting or taking part in such trade, directly or indirectly, for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy.

* * * * *

Sec. 5(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may,

through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accom-

plishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

Sec. 7(b) Nothing in this Act contained shall render valid or legal, or be construed to recognize as valid or legal, any act or transaction constituting trade with, to, from, for or on account of, or on behalf or for the benefit of an enemy performed or engaged in since the beginning of the war and prior to the passage of this Act, or any such act or transaction hereafter performed or engaged in except as authorized hereunder, which would otherwise have been or be void, illegal, or invalid at law.

No conveyance, transfer, delivery, payment, or loan of money or other property, in violation of section three hereof, made after the passage of this Act, and not under license as herein provided shall confer or create any right or remedy in respect thereof; and no person shall by virtue of any assignment, indorsement, or delivery to him of any debt, bill, note, or other obligation or chose in action by, from, or on behalf of, or on account of, or for the benefit of an enemy or ally of enemy have any right or remedy against the debtor, obligor, or other person liable to pay, fulfill, or perform the same unless said assignment, indorsement, or delivery was made prior to the beginning of the war or shall be made under license as herein provided, or unless, if made after the beginning of the war and prior to the date of passage of this Act, the person to whom the same was made shall prove lack of knowledge and of reasonable cause to believe on his part that the same was made by, from or on behalf of, or on account of, or for the benefit of an enemy or ally of enemy; and any person who knowingly pays, discharges, or satisfies any such debt, note, bill, or other obligation or chose in action shall, on conviction thereof, be deemed to violate section three hereof: *Provided,* That nothing in this Act contained shall prevent the carrying out, completion, or performance of any contract, agreement, or obligation originally made with or entered into by an enemy or ally of enemy where, prior to the beginning of the war and not in contemplation thereof, the interest of such enemy or ally of enemy devolved by assignment or otherwise upon a person not an enemy or ally of enemy, and

no enemy or ally of enemy will be benefited by such carrying out, completion, or performance otherwise than by release from obligation thereunder.

* * * * *

Sec. 9(a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if

the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

Sec. 16. That whoever shall willfully violate any of the provisions of this Act or of any license,

rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act, shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than ten years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by a like fine, imprisoned, or both, and any property, funds, securities, papers, or other articles or documents, or any vessel, together with her tackle, apparel, furniture, and equipment, concerned in such violation shall be forfeited to the United States.

* * * * *

Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order No. 8785, June 14, 1941, 6 F. R. 2897:

Sec. 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

* * * * *

E. All transfers, withdrawals, or exportations of, or dealings in, any evidences of indebtedness

or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * * * *

Executive Order No. 9095, of March 11, 1942, 7 F. R. 1971, as amended by Executive Order No. 9193, of July 6, 1942, 7 F.R. 5205, and by Executive Order No. 9567, of June 8, 1945, 10 F. R. 6917:

* * * * *

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

(a) Any business enterprise within the United States which is a national of a designated enemy country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by an enemy country or national thereof;

* * * * *

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